

# An Update on Michigan's Medical Marihuana Act

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## Medical Marihuana Trends in USA

- 1996 - California
- 1998 - Alaska, Oregon & Washington
- 1999 - Maine
- 2000 - Colorado, Hawaii & Nevada
- 2004 - Montana & Vermont
- 2006 - Rhode Island
- 2007 - New Mexico
- 2008 - Michigan
- 2010 - Arizona, DC & New Jersey
- 2011 - Delaware
- 2012 - Connecticut, Massachusetts
- 2013 - Illinois, New Hampshire
- 2014 - Maryland, Minnesota, New York



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## Federal Law

- The Federal Controlled Substance Act (CSA) classifies marihuana as a Schedule 1 drug, meaning that Congress recognizes no acceptable medical use for it, and its possession is generally prohibited.
- As a federal court in Michigan recently recognized, "It is indisputable that state medical marihuana laws do not, and cannot supersede federal laws that criminalize the possession of marihuana." *United States v. Hicks*, United States District Court, E.D. of Michigan, 2010.



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## Department of Justice's Position-October 19, 2009

- The Department of Justice put forth new legal guidelines.
- Prosecutors will be told "It is not a good use of their time to arrest people who use or provide medical marihuana in strict compliance with state law."



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## Department of Justice's Position-June 29, 2011

- The Department of Justice clarified its previous position.
- The Department's position in October 2009 "was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law."



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## Department of Justice's Position-August 29, 2013

- "The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marihuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health and other law enforcement interests."



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### Areas of Importance for the Department of Justice- August 29, 2013

- Department of Justice will still prosecute individuals or entities to prevent:
  - the distribution of marihuana to minors;
  - revenue from the sale of marihuana from going to criminal enterprises, gangs and cartels;
  - the diversion of marihuana from states where it is legal under state law in some form to other states;
  - state-authorized marihuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
  - violence and the use of firearms in the cultivation and distribution of marihuana;
  - drugged driving and the exacerbation of other adverse public health consequences associated with marihuana use;
  - growing of marihuana on public lands and the attendant public safety and environmental dangers posed by marihuana production on public lands;
  - preventing marihuana possession or use on federal property.

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### ATF Open Letter-9/21/11

- "Any person who uses or is addicted to marihuana, regardless of whether his or her State has passed legislation authorizing marihuana use for medicinal purposes, is an unlawful user of or addicted to a controlled substance, is prohibited by Federal law from possessing firearms or ammunition."

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### Michigan Public Health Code Law-Schedule 1 Drug

- Marihuana is classified as a Schedule 1 drug under the Michigan Public Health Code, MCL 333.7212.
- It is a Schedule 1 drug if the Michigan Board of Pharmacy:

*"finds that the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision."*

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## Application Process for Medical Marijuana Card

- An applicant submits a Department of Licensing and Regulatory Affairs ("LARA") approved application, fee, copy of current photo ID and a physician certification to LARA.
  - Fee is \$60 for a patient and \$25 for a primary caregiver.
- LARA reviews and approves/denies application with 15 days of receipt.
- LARA issues registration card with 5 days of approval.
- The statute allows for a copy of the application submitted to serve as a valid registry identification card if the card is not issued within 20 days of its submission to LARA.

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## Changes in the Application Process-April 1, 2013

- Require an applicant for a registry ID card to submit proof of Michigan residency by providing a copy of driver license, State ID card, or voter registration See, *People v. Jones, No. 312065*, decided July 9, 2013, Michigan Court of Appeals
- Require LARA to issue a registry ID card within five business days of approving an application or renewal rather than within 5 days
- Provide that registry ID card would expire 2 years, rather than 1 year, after it was issued

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## Confidentiality

- LARA keeps a confidential list of the individuals to whom it has issued a card.
- Law enforcement can check if a registration number is valid through LEIN.
- Verifications can **ONLY** be given to law enforcement personnel.

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## MCL 333.26426(h)(4)

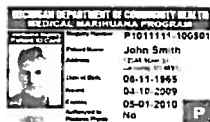
- A person, including an employee or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor, punishable by imprisonment for not more than 6 months.
- Notwithstanding this provision, department employees may notify law enforcement about falsified or fraudulent information submitted to the department.

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Compliance Fee

## Identification Card System

LARA has established an identification card system for patients qualified to use Marijuana and individuals qualified to be primary caregivers.



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## Newest Registry Identification Cards



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## Physician's Role

- Only a physician (MD or DO) fully licensed in Michigan can make a valid written certification
- The certifying physician is not prescribing marijuana; a physician cannot do so.
- The physician is not recommending marijuana; the law does not require them to do so.
- The physician is only stating an "opinion" as to the likelihood of a medical benefit, and can do so under the law without any legal or professional liability, except that a physician is always subject to professional malpractice.

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## Written Certification-April 1, 2013

- The physician has completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation.

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## Bona Fide Physician-Patient Relationship-April 1, 2013

- (1) The physician has reviewed the patient's relevant medical records and completed a full assessment of the patient's medical history and current medical condition, including a relevant, in-person, medical evaluation of the patient.
- (2) The physician has created and maintained records of the patient's condition in accord with medically accepted standards.
- (3) The physician has a reasonable expectation that he or she will provide follow-up care to the patient to monitor the efficacy of the use of medical marijuana as a treatment of the patient's debilitating medical condition.
- (4) If the patient has given permission, the physician has notified the patient's primary care physician of the patient's debilitating medical condition and certification for the use of medical marijuana to treat that condition.

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## Benefit of Participation in the Registry Identification Program

- A registered "Qualifying Patient" is allowed to possess an amount of marihuana that does not exceed 2.5 ounces of usable marihuana and allowed to cultivate 12 marihuana plants kept in an enclosed, locked facility.
- Either the Qualifying Patient or the Primary Caregiver can be allowed to possess the marihuana plants.
- A qualifying registered patient is protected from "arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau" for medicinal use or possession of marihuana.

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## *People v. Nicholson*, No. 306496 (Mich. App., June 26, 2012)

- The defendant was not immune from arrest because his application paperwork for a registry identification card under the MMMA was "not reasonably accessible at the location of his arrest."
- However, because he possessed a registry identification card that had been issued before his arrest when being prosecuted, he was immune from prosecution unless there is evidence showing that his possession of marihuana at the time was not in accordance with "medical use" as defined in the MMMA or otherwise not in accordance with the MMMA.



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## Protection from Arrest, April 1, 2013

- Require a qualifying patient or primary caregiver to present both his or her registry identification card *and* a valid driver license or government-issued photo ID card, in order to be protected from arrest.



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## Medical Use of Marihuana

- The acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating condition or symptoms. MCL 333.26423(e).

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*State of Michigan v. McQueen*, No. 143824 (Mich. Sup. Ct., February 8, 2013)

- The Michigan Supreme Court clearly stated on page 10 that: "In contrast to several other states' medical marihuana provisions, the MMMA does not explicitly provide for businesses that dispense marihuana to patients."

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*State of Michigan v. McQueen*, No. 143824 (Mich. Sup. Ct., February 8, 2013)

- "Thus, § 4 immunity does not extend to a registered qualifying patient who transfers marihuana to another registered qualifying patient for the transferee's use because the transferor is not engaging in conduct related to marihuana for the purpose of relieving **the transferor's own** condition or symptoms."

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*State of Michigan v. McQueen*, No. 143824 (Mich. Sup. Ct., February 8, 2013)

- "Similarly, § 4 immunity does not extend to a registered primary caregiver who transfers marihuana for any purpose other than to alleviate the condition or symptoms of a specific patient **with whom the caregiver is connected through the MDCH's registration process.**"



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## Marihuana-MCL 333.7106

- "Marihuana" means all parts of the plant *Cannabis sativa* L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin.



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## Usable Marihuana-MCL 333.26423(j)

- The dried leaves and flowers of the Marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalk, and roots of the plant. MCL 333.26423(j).



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*People v Carruthers*, No. 309897 (Mich. App., July 11, 2013)

- The Court held "that edibles made with THC extracted from marihuana resin are not" usable marihuana" under the MMMA.
- The brownies were not a "mixture or preparation" of "dried leaves and flowers of the marihuana plant." MCL 333.26423(k).
- Therefore, the brownies were not "usable marihuana" under the MMMA, and none of the weight of the brownies should have been counted towards the determination of whether defendant possessed over 12.5 ounces of usable marihuana."

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Qualifications for Registered Primary Caregiver

- The patient designates an individual as the primary caregiver on the patient's registration application form.

The primary caregiver shall:

- be 21 years old;
- have no felony convictions involving illegal drugs;
- agree to assist patient with medical use of marihuana.

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Qualifications for Registered Primary Caregiver-April 1, 2013

- Revise the definition of "primary caregiver" to refer to a person who has not been convicted of any felony within the past 10 years
- Never been convicted of a felony involving illegal drugs or a felony that is an "assaultive crime" as defined in Michigan Compiled Law 770.9a



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### Possession, Cultivation, and Plant Limits for a Registered Primary Caregiver

- Not to exceed 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is **connected through the department's registration process.** MCL 333.26424(b)(1).
- For each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. MCL 333.26424(b)(2).

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### Not Subject to Arrest

These primary caregivers shall not be subject to arrest, prosecution, or civil penalty or disciplinary action by a business or professional licensing board or bureau, for the medical use of Marihuana. MCL 333.26424(b).

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### Enclosed, Locked Facility-April 1, 2013

A closet, room, or **other comparable, stationary, and fully enclosed area** equipped with secured locks or other **functioning** security devices that permit access only by a registered primary caregiver or registered qualifying patient. MCL 333.26423(d).



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### Enclosed, Locked Facility-Plants Grown Outdoors-April 1, 2013

- Not visible to the unaided eye from an adjacent property when viewed by an individual at ground level or from a permanent structure and are grown within stationary structure that is enclosed on all sides
- Conditional on where you live and not seen by the unaided eye-the exceptions would be for the base, by chain-link fencing, wooden slats, or a similar material that prevents access by the general public and that is anchored, attached, or affixed to the ground
- Located on land that is owned, leased, or rented by either the registered qualifying patient or the registered primary caregiver
- Equipped with functioning locks or other security devices restricting access only to the registered qualifying patient or the registered primary caregiver

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### Enclosed, Locked Facility- Motor Vehicle-April 1, 2013

- The vehicle is being used temporarily to transport living marihuana plants from 1 location to another with the intent to permanently retain those plants at the second location
- An individual is not inside the vehicle unless he or she is either the registered qualifying patient to whom the living marihuana plants belong or the individual designated through the departmental registration process as the primary caregiver for the registered qualifying patient.

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### MCL 750.474-Transporting "Usable Marihuana" Motor Vehicle-12/27/12

- Enclosed in a case that is carried in the trunk of a vehicle
- Enclosed in a case that is not readily accessible from the interior of the vehicle, if the vehicle in which the person is traveling does not have a trunk
- Misdemeanor-93 days or a fine of not more than \$500.00, or both.

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## In the Presence or Vicinity

"A person shall not be subject to arrest or prosecution, solely for being in the presence or vicinity of the medical use of marihuana, or for assisting a registered qualifying patient with using or administering marihuana." MCL 333.26424(i).

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## Seizure and Forfeiture

"Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited." MCL 333.26424(h).

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## No Probable Cause

The possession or application for a registry identification card does not constitute probable cause or reasonable suspicion and can not be used to support the search of the person or property of an individual who possesses or applies for a card, or otherwise subject the person to inspection by local, county, or state governmental agencies. MCL 333.26426(g).

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## Criminal Section in the MMMA

- "Any registered qualifying patient or registered primary caregiver who **sells** marihuana to someone who is not allowed to use medical marihuana for medical purposes under this act shall have his or her registry identification card revoked and is guilty of a felony for not more than 2 years." MCL 333.26424(k)
- Effective, December 27, 2012-Class G felony against the public trust.



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## What is Prohibited Under MCL 333.2647(b)

- Smoking marihuana "in any public place"
- Smoking marihuana on any form of public transportation
- Undertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice
- Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana
- Any use or possession on the grounds of any preschool, primary, or secondary school
- Any use or possession in any correctional facility

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## Other Michigan Laws

MCL 333.26427(e) reads that:  
"All other acts and parts of acts  
inconsistent with this act do not  
apply to the **medical use** of  
marihuana as provided by this act."

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***People v Koon***, No. 145259 (Mich. Sup. Ct., May 21, 2013)

- "The immunity from prosecution provided under the MMMA to a registered patient who drives with indications of marihuana in his or her system but is not otherwise under the influence of marihuana inescapably conflicts with MCL 257.625(8), which prohibits a person from driving with any amount of marihuana in her or system."
- "Under the MMMA, all other acts and parts of acts inconsistent with the MMMA do not apply to the medical use of marihuana. Consequently, MCL 257.625(8) does not apply to the medical use of marihuana."

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***People v. Kolanek, and People v. King***, Nos. 142712 and 142695 (Mich. Sup. Ct., May 31, 2012)

- Persons who do not qualify for immunity under §4 (whether because unregistered at the time or because in possession of too much marihuana or not in an enclosed locked facility) may still raise a Section 8 defense that their possession of marihuana was for medical purposes; the Section 4 factors need not be shown to have a valid affirmative defense under Section 8.

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**Statutory Affirmative Defense-Section 8**

MCL 333.26428(a) states that "Except as provided in Section 7, a patient and a patient's primary caregiver, if any, may assert, the medical purpose for using marihuana as a defense to any prosecution involving marihuana."

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## Evidentiary Hearing

- Pursuant to MCL 333.26428(a)(3), "A person may assert the medical purpose for using marihuana in a motion to dismiss, and the charges shall be dismissed following an evidentiary hearing where the person shows the elements listed in subsection (a)."

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## Element #1 Under Section 8: Physician's Statement

A physician (Licensed M.D./D.O.) has stated that:

- In the physician's professional opinion
- After having completed a full assessment of the patient's medical history and patient's medical condition
- Which assessment was made in the course of a bona-fide physician-patient relationship
- That the patient is likely to receive therapeutic or palliative benefit
- From the medical use of marihuana
- To treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

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## Element #2 Under Section 8: Reasonably Necessary Quantity

The patient and the patient's primary caregiver, if any, were collectively:

- In possession of a quantity of marihuana that was:
- Not more than was reasonably necessary
- To ensure the uninterrupted availability of marihuana
- For the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

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### Element #3 Under Section 8: Medical Use

The patient and the patient's primary caregiver

- Were engaged in the:
  - Acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana or paraphernalia relating to the use of marihuana
  - To treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.

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### Legal Issue #1

- Is a "visiting qualifying patient" with a card from another state limited to possessing the amount listed under the Act, or can they possess what is allowed under their own state law?

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### MCL 333.26424(j) of the Act

- It provides that another state's marihuana card "shall have the same force and effect as a registry identification card issued by the department."
- It should be noted that Michigan recognizes CPL permits from other states, however, it requires out of state CPL permit holders to comply with the restrictions stated in Michigan law.

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## Legal Issue #2

- Can an employer discipline/terminate an employee for using medical marihuana?



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## Casias vs. Wal-Mart, U.S. District Court, decided February 11, 2011

- Civil case in Calhoun County which Wal-Mart fired an employee who tested positive for marihuana which he used while off-duty.
- The Court ruled that the "state's medical marihuana law protects users from arrest, but not employers' policies that ban the use of the drug."



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## Casias vs. Wal-Mart, U.S. Court of Appeals, 6<sup>th</sup> Circuit, decided September 19, 2012

- "The Plaintiff, Casias, cannot sue the company for violation of the Michigan Medical Marijuana Act because the law does not regulate private employment."



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**Braska, et. al. v. LARA**, No. 313932 (Mich. App., October 23, 2014)

- The Michigan Court of Appeals ruled "That workers fired solely for failing a drug test because of their legal use of medical marihuana qualify for unemployment benefits, because the state's medical marihuana law preempts its unemployment law."



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## Marihuana Potency

### Average THC:

2008:	10.1%
2007:	7.3%
1983:	<4%



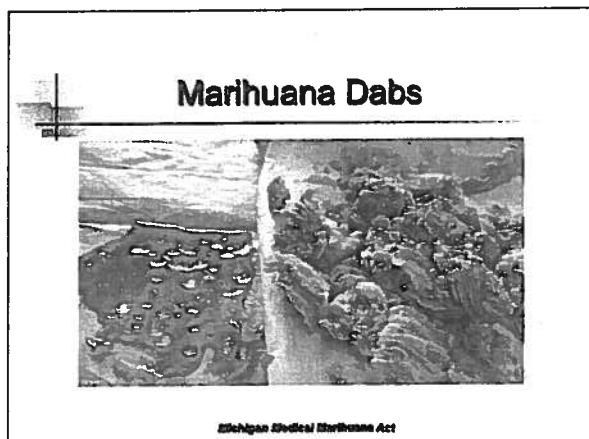
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## Marihuana Dabs

- Dabs are a type of solidified hash oil also known as "concentrates," BHO (Butane Hash Oil) or more popularly, "wax"—so-named for its texture and glassy appearance.
- Most commonly created by a technique in which high quality pot is blasted with butane that is then extracted
- Dabs cannabis concentrates approach 70%-to-90% THC



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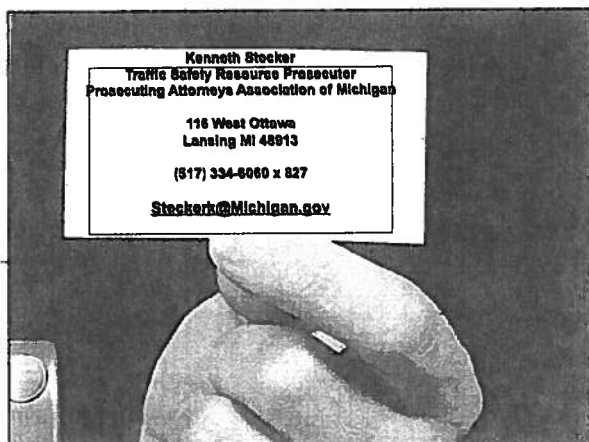
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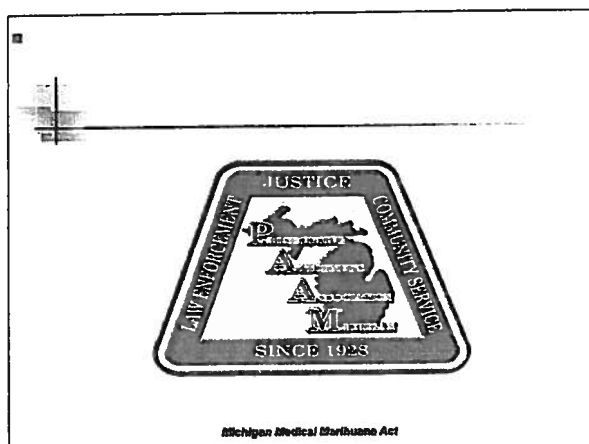
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